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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-759

DAVID H. LEROY,
ATTORNEY GENERAL OF IDAHO,
et al., Defendants-Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Plaintiff-Appellee

On Appeal from the United States Court
of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

The National Association of Insurance Commissioners (NAIC) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the appellants has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the NAIC in this case, as more fully detailed at pages 1-4 of the attached brief, arises from the fact that NAIC members are charged with the responsibility of comprehensively regulating the insurance

business in their respective states. Such regulatory responsibility necessarily extends to tender offers and other acquisitions of domestic insurance companies. The Idaho law challenged in this case provides, as do most such state laws, for hearings involving the insurance commissioner whenever insurance companies are the subject of a tender offer within the scope of the law. More significantly to NAIC members, provisions of the Idaho Corporate Takeover Law being challenged on preemptive grounds in this case are similar in all material respects to those included in the insurance holding company laws of forty-three states and the District of Columbia. The alleged constitutional impediments in the Idaho law are the same as those which are being asserted against the Insurance Holding Company Act of at least one NAIC member in a case pending in the United States District Court, Eastern District of Louisiana, *Roussel v. Boren,* No. 78-2345, (E.D. La.).

By virtue of the 1970 amendments to the Williams Act provisions of the Securities Exchange Act of 1934, equity securities of insurance companies were brought within the scope of the tender offer regulation prescribed in that Act. Because the states comprehensively regulate the insurance business, not only pursuant to state law but also in accordance with congressional direction provided by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1970), the NAIC is uniquely situated to develop the argument that Congress did not intend to preempt states from regulating tender offers as evidenced by congressional acceptance of state insurance regulation.

Although the relevance of this case to the constitutionality of the corporate takeover laws of other states has been amply noted by the parties and the lower court opinion, there has been no concern expressed for the precedential effect this case portends for state insurance regulation of tender offers and other corporate acquisitions. In this respect, the NAIC believes that it stands in a relevant and unique position to urge a circumspect review on preemption grounds of the law challenged in this case. If the argument presented in the attached brief is accepted, it would be dispositive of the preemption issue presented by this case.

Respectfully submitted,

/s/

Richard A. Hemmings
One of the Attorneys of
Record for the National
Association of Insurance
Commissioners

February 22, 1978

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BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is a voluntary association of the principal insurance regulatory officials charged by law with the responsibility of supervising the business of insurance within each state, the District of Columbia, Guam, Puerto Rico and the Virgin Islands.

The individual state insurance commissioners who comprise the NAIC, and the insurance-consuming public on whose behalf NAIC members regulate, have a vital interest in the outcome of this case. In light of the substantial public interest in a viable, competitive and responsible insurance industry, a comprehensive system of

insurance regulation has evolved in every state. By virtue of the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1970), which in 1945 threw the weight of Congress behind the existing system of state insurance regulation, the states are actively engaged in comprehensive regulation.

The NAIC believes this case reflects a disturbing tendency by federal district and appellate courts to assert personal jurisdiction over state officials. Countenance of jurisdiction asserted in foreign and distant courts may substantially impair the ability of the states to deal with common regulatory problems, as a result of the expense and time required to defend suits in distant jurisdictions, to the detriment of the public interest. The NAIC supports and adopts the arguments of the appellants on the jurisdictional issues raised by this case. However, the interests of the NAIC in the resolution of such issues are in all material respects identical to those of the appellants. Consequently, the jurisdictional issues will not be separately addressed by the NAIC.

The interests of the NAIC similarly extend to the appellants' position on the commerce clause issue presented by this case. While the NAIC supports and adopts the position of the appellants in arguing for reversal of the lower court's commerce clause determination, that argument will not be separately developed by the NAIC. However, regardless of the outcome on the merits in this case of the commerce clause issue, the NAIC notes and endorses the distinction drawn in dictum by the Fifth Circuit Court of Appeals on the varying application of commerce clause limitations to state law. In particular, the court observed that:

> When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. [citation omitted] Congress has also stated that, in the absence of affirmative congressional action, courts shall impose no barriers on state regulation. *See* the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §1011 *et seq. Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1281 (5th Cir. 1978).

It is the opinion of the NAIC that this distinction is an essential limitation on the resolution of the commerce clause issue facing this Court.

The NAIC's particular and most vital interest in this case stems from the decision of the court below on the preemptive relationship of the Securities Exchange Act of 1934 and its Williams Act provisions with the Idaho Corporate Takeover Law. The Idaho law, like most similar state laws, applies to insurance companies, Idaho Code §30-1512(1), and provides for the involvement of the state insurance commissioner in any determination made under the law by the state with respect to insurance companies. Of even greater interest to the NAIC, most states have enacted insurance holding company laws, applicable *inter alia* to tender offers for domestic insurance companies. The holding company laws contain operative provisions similar to those challenged in the Idaho Corporate Takeover Law. Although the insurance holding company laws have been enacted for the purpose of protecting insurance policyholders rather than stockholders, the preemption analysis of the lower court on its face would appear to apply to state insurance commissioners enforcing such laws.[1] Because the lower

[1] "The test of whether both federal and state regulations may operate or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 143 (1963).

court determined there to be an inherent, irreconcilable conflict between state laws applicable to tender offers and the national regulatory scheme for tender offers said to be established by the Williams Act, this action presents an issue of major significance to members of the NAIC in carrying out their insurance regulatory responsibilities.

The NAIC respectfully submits this brief to express its concern on the constitutionality of state tender offer regulation generally and the relevance of the issue to state insurance regulation. The NAIC will specifically argue that the Idaho Corporate Takeover Law is not preempted by the Williams Act.

ISSUE PRESENTED

Whether Congress, in enacting the Williams Act amendments to the Securities Exchange Act of 1934 for the purpose of regulating tender offers and other corporate acquisitions, has preempted the states from regulating corporate tender offers and acquisitions in a manner that differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

SUMMARY OF ARGUMENT

The Fifth Circuit's finding of state law preemption in connection with the Williams Act provisions of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (1976) misconstrued the preemption doctrine. Preemption of state tender offer regulation is on its face inconsistent with Section 28 of the Securities Exchange Act of 1934, 15 U.S.C. §78bb(a). That provision expressly saves state regulation not "in conflict" with the 1934 act. There has in this case been no showing of state law conflict with the provisions of the Securities Exchange Act.

Even if state tender offer regulation is not saved by the express provisions of the Securities Exchange Act, the preemption analysis of the lower court was in error. State corporate takeover laws operate in a field traditionally occupied by the states. This Court's preemption decisions have found state law to be preempted only when there is evident a clear and unmistakable congressional purpose to oust state regulation. Conflict with state law must be irreconcilable. Not only is there no clear preemptive purpose or inevitable conflict with the Williams Act, but the purpose said to have been frustrated by the state law was incorrectly identified. The purpose Congress sought to achieve in the Williams Act was protection of investors, rather than avoiding delay in tender offers or maintaining a neutral balance between offerors and the target company management. The challenged state law must be measured against the investor protection standard. There has been no showing that the state law harmed investors or that it was in any other way incompatible with investor protection.

Examination of other relevant congressional and administrative action reinforces the argument that Congress entertained no preemptive intent in enacting the Williams Act. Application of the Williams Act to tender offers for insurance companies necessarily implies congressional acceptance of concurrent state regulation. Congress has acted to make state insurance regulation supreme as it relates to the business of insurance. State insurance regulators are necessarily concerned with tender offers for insurance companies and other shifts in corporate control in fulfilling their regulatory responsibility.

Congress has also acted to implement merger rules drawn from the antitrust perspective that provide for

longer tender offer periods than those inferred from the Williams Act. This and similar congressional action belies any carefully constructed balance of tender offeror-target interests that lies at the heart of the lower court's preemption analysis.

Similarly, the Securities and Exchange Commission has proposed substantially longer minimum periods during which tender offers must remain open than those which may be inferred from the Williams Act. A major pretext for concluding that Congress intended to preempt the states is the scheme of the Williams Act. The tender offer system set forth in the Act is said to evidence a purpose to strike a neutral balance between tender offer contestants by avoiding delay in tender offers. The commission proposals clearly negate any commission understanding of this preemptive purpose. Contrary to the view of the lower court, Congress has not clearly expressed any purpose upon which to preclude concurrent state regulation of tender offers. The state tender offer systems cannot be said to be in conflict with the investor protection objectives of federal law. Therefore, the decision of the lower court should be reversed.

ARGUMENT

Introduction

The lower court's decision in *Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978) to invalidate the Idaho Corporate Takeover Law under the Supremacy Clause, U.S. CONST., art. VI, places in serious doubt the constitutionality of state law regulating the execution of corporate acquisitions and mergers. In particular, the decision necessarily implies that the general

corporate takeover laws of numerous other states are invalid.[2] Similarly the viability of forty-four state insurance holding company laws[3] which apply to tender offer bids has been rendered suspect.

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[2] The Fifth Circuit opinion lists thirty-one jurisdictions having corporate takeover laws as of the date the case was considered by that court. 577 F.2d 1256, 1261.

[3] *See* ALA. CODE §27-29-3(d)(1)(b) (Supp. 1973); ALASKA STAT. §21.22.030(2) (1966); ARIZ. REV. STAT. ANN. §20-481.07 (1975); ARK. STAT. ANN. §66-5005(d)(l)(ii) (1966); CALIF. INS. CODE §1215.2(d)(2) (West 1972); COLO. REV. STAT. ANN. §10-3-803(5)(b) (West 1969); DEL. CODE tit. 18, §4930(b)(4), 4932(b)(4) (1975); D.C. CODE ANN. §35-1903(d)(1)(B); GA. CODE ANN. §56-3403(d)(1)(ii) (1977); IDAHO CODE ANN. §41-3805(1)(b) (1977); ILL. ANN. STAT. ch. 73, §743.8(1)(b) (Supp. 1977); IND. ANN. STAT. §27-1-23-2(d)(1)(ii) (Burns 1975); IOWA CODE ANN. §521A.3(4)(a)(2) (1977); KAN. STAT. ANN. §40-3304(d)(1)(B) (1973); KY. REV. STAT. ANN. §304.37-010 (Baldwin 1971); LA. REV. STAT. ANN. §22:731(2)(a) (Supp. 1977); MD. ANN. CODE art. 48a §494(e)(ii) (Supp. 1977); MASS. GEN. LAWS ANN. ch. 175, §193M(d)(1)(ii) (West 1972); MICH. STAT. ANN. §500.1315(1)(b) (Supp. 1978); MINN. STAT. ANN. §60D.02(4)(1)(ii) (Supp. 1978); MISS. CODE ANN. §83-6-1 (1977); MO. REV. STAT. §382.060(1)(2) (Vernon Supp. 1978); MONT. REV. CODE ANN. §40-5511(d)(1)(ii) (1961); NEB. REV. STAT. §44-2108(1)(b) (1974); NEV. REV. STAT. §692C.210(1)(b) (1975); N.H. REV. STAT. ANN. §401-B:3VI(a)(2) (Supp. 1975); N.J. REV. STAT. §17:27A-2(d)(1)(ii) (1970); N.M. STAT. ANN. §58-30-7(B) (1962); N.Y. INS. LAW §69-f(2)(f) (McKinney 1966); N.D. §3.1 Rules and Reg. Regarding Takeover Bids (1977); OHIO REV. CODE ANN. §3901.32 (1971); OKLA. STAT. tit. 36, §1653(d)(1)(ii) (West 1976); ORE. REV. STAT. §732.540(1)(e) (1977); PA. STAT. ANN. tit. 40, §459.6(d)(4) (Purdon 1971); R.I. GEN. LAWS §27-35-2(d)(1)(ii) (Supp. 1976); S.C. CODE ANN. §37-1408(1)(ii) (Supp. 1975); S.D. COMPILED LAWS ANN. §58-5A-9(2) (1969); TENN. CODE ANN. §56-3612-3615 (Supp. 1976); TEX. INS. CODE ANN. art. 21.49-1, §5(e)(1)(ii) (Vernon 1963); UTAH CODE ANN. §31-39-2(4)(b) (1974); VT. STAT. ANN. tit. 8, §3683(f)(1)(B) (1971); VA. CODE ANN. §38.1-178.1:4(2) (1976); WASH. REV. CODE ANN. §48.31A.050(1)(b) (Supp. 1976); W. VA. CODE §33-27-3(d)(1)(ii) (1975).

In its factual description of the Idaho Corporate Takeover Law,[4] the Fifth Circuit noted these salient characteristics:

> Idaho's takeover law required Great Western, among other things, (1) to submit to the Director of the Idaho Department of Finance a preeffective filing disclosing Great Western's intention to make a tender offer and the terms of the offer; (2) to transmit, at the same time, a copy of that filing to Sunshine; (3) to publish an advertisement describing the intention to make an offer and the proposed material terms; (4) to pay the Idaho registration fee; (5) to participate in a hearing, which would be mandatory if Sunshine requested one; and (6) to delay its tender offer until the final judgement of any administrative or injunctive proceeding brought by the Director of Finance. . . . 577 F.2d 1256, 1263 (1978).

This factual description is in most material respects applicable to the insurance holding company laws of the several states. These insurance laws are in most states patterned after the NAIC Model Insurance Holding Company Act which includes provisions which require filing, notice to the person being acquired, a public hearing, and approval of the insurance commissioner for any acquisition of control.[5] The Insurance Holding Company laws of the several states are specifically applicable to tender offers for control of domestic insurers.[6]

In effect, the decision of the circuit court broadly supplants the legislative intent and wisdom of the great majority of states. Given the long-established pattern of parallel state and federal regulation of securities transactions and the primary role of the states in corporate governance, the circuit court's decision miscarried in its application of constitutional law doctrine. The decision of the court below ignores the stricture of this Court in deciding cases of parallel state and federal jurisdiction. "[T]he 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists'." *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446 (1966); *Exxon Corp. v. Governor of Maryland,* — U.S. —, 57 L.Ed. 2d 91, 103 (1978).

[4] Idaho Takeover Statute, IDAHO CODE §§30-1501-1513 (Cum. Supp. 1977).

[5] §§3(a), (d), NAIC Model Insurance Holding Company System Regulatory Act, II PROCEEDINGS OF NAIC, 738-751 (1969).

[6] *See, e.g.* NAIC Model Insurance Holding Company System Regulatory Act, Sec. 3(a), II PROCEEDINGS OF NAIC 738-751 (1969); ILL. ANN. STAT. ch. 73 §743.4 (Supp. 1977); MINN. STAT. ANN. §60D.02 (Supp. 1973).

I. THE PREEMPTION DOCTRINE WAS INCORRECTLY APPLIED BY THE LOWER COURT

Invalidation of state law by operation of the supremacy clause, U.S. CONST. art. VI, is not to be lightly concluded. "[H]ypothetical conflict is not sufficient to warrant preemption." *Exxon Corp. v. Governor of Maryland,* — U.S. —, (1978). 57 L.Ed. 2d 91, 103 (1978). There has, in the instant case, been *no* finding that the Corporate Takeover Law of Idaho was in conflict with the provisions of the Williams Act. In discussing its application of the preemption doctrine, the lower court acknowledged it did "not focus on those [arguable] inconsistencies nor decide whether they would be sufficient to preempt Idaho's law . . . ." 577 F.2d at 1275.

The preemption doctrine has been developed from the supremacy clause of the U.S. Constitution which states that the Constitution and federal law "made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." U.S. CONST., art. VI, cl. 2. Prior decisions of this Court have

clearly laid out the path to be followed in resolving preemption issues. First, state law is to be preempted where Congress has expressly declared its intent to exclude state regulation in a particular field. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-230 (1947). A second test applied by the Court will invalidate state law where it affects a field occupied by federal law in which the federal interest is so dominant that congressional intent to preempt state law can be inferred. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Finally, a third test has been used to preempt state laws where it is shown that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). It was the third test upon which the lower court relied to invalidate the Idaho Corporate Takeover Act. A brief reflection upon the first two tests does sustain their inapplicability to any determination of preemption in this case.

In resolving preemption issues, the Court's first inquiry concerns congressional intent to preclude state regulation of the particular aspects of commerce presented by the case. Congress, pursuant to its power to regulate interstate commerce, U.S. CONST., art. I, §8, may of course prohibit state regulation in a particular area of commerce. The Fifth Circuit Court correctly noted that "[n]othing in the 1934 [Securities Exchange] Act explicitly preempts all state takeover legislation; indeed, §28 has a contrary tone." 577 F.2d at 1275. The Idaho corporate takeover law, as evidenced by the specific language of §28 of the 1934 act, is thus clearly not subject to express statutory preemption.

In accordance with the second test, it has been held that state law may be invalidated if congressional intent to preclude parallel state regulation can be inferred. Such a result is compelled where Congress has "unmistakably . . . ordained," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone must apply to some part of commerce occupied by federal law. "This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). The circuit court below explicitly noted that it did not infer, on the basis of dominant federal interests in the field occupied by the Williams Act, Congressional intent to preclude application of state law.[7] Even if it had, the conclusion that no preemption could be inferred is inescapable, both on the basis of Section 28 of the 1934 Securities Exchange Act, of which the Williams Act is a part, and on the basis of prior case law and the underlying traditional role of the state in regulating corporate activities and their security transactions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973); *SEC v. National Securities, Inc.*, 393 U.S. 453, 461 (1969).

Recognizing that the first two preemption tests involving either an explicit or inferred preemption do not support a finding of preemption in this case, the circuit court framed its decision around the third preemption test which was articulated in *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Fifth Circuit's application of the *Hines*

[7] "We need not reach the question whether Congress implicitly ruled out all state legislation of tender offers when it amended the 1934 Act with the Williams Act." 577 F.2d at 1275.

test appears to have been strongly influenced by the use of that test in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).[8] The preemption test set forth by *Hines* and *Jones* was adequately described by the Fifth Circuit opinion:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. CONST., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). 577 F.2d at 1274-1275.

Notwithstanding the possible relevance of the *Hines* operational test of preemption, the Fifth Circuit Court incorrectly applied that test to the facts of this case. This conclusion is based upon two critical errors in the opinion of the lower court. First, the court made no effort to reconcile the operation of a presumptively valid state law with an obvious purpose or objective of Congress. Secondly, the court below erred in determining what con-

[8] In dismissing Idaho's preemption arguments, the lower court concluded that "the appellant's definition of 'conflict' is too narrow for the usual preemption test; *Jones* ambiguously reaffirms that in general the *Hines* test rather than a more limited examination for contradictions is the proper one." 577 F.2d 1256, 1276. Whatever *Jones* implies as to the general preemption test to be used, that case involved decisions based upon explicit preemption clauses of the federal Weights and Measures Act, 21 U.S.C. §678 (1972), and the Fair Packaging and Labeling Act, 15 U.S.C. §1461 (1974). Those laws scrutinized in *Jones* clearly expressed an intent to broadly displace state law which is "less stringent" or "different than" the federal law. In sharp contrast, the Securities Exchange Act expressly saves state law, displacing it only when in "conflict." 15 U.S.C. §78bb(a).

gressional purpose was relevant to the preemption question. To each of these errors we now turn.

A. There Was No Application of the Test of Irreconcilable Conflict to Preemption of the Idaho Corporate Takeover Law

1. The Need for Irreconcilable Conflict with a Clearly Expressed Congressional Purpose

In cases where the field which Congress is said to have preempted has traditionally been occupied by the states, the decisions of this Court appropriately have started "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In a recent case, the Court more particularly noted the importance of maintaining the proper balance of state and federal regulatory interests in the securities area. "Absent a clear indication of congressional intent, we are reluctant to federalize the substantive portion of the law of corporations that deals with transactions in securities." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977). The assumption that state law is valid, where it applies to an area traditionally regulated by the states, provides assurance that the proper federal-state balance is maintained and that it "will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones v. Rath Packing Co.*, 430 U.S. at 525 (1977).

In rejecting Idaho's argument that explicit statutory conflict is necessary to find preemption, the lower court also erroneously rejected any need to reconcile operation of the state and federal laws. In so doing, the reliance of the court below on *Jones* is at best superficial. While

Jones may support application of the *Hines v. Davidowitz,* 312 U.S. 52 (1941) test of preemption to the instant case, *Jones* also demonstrates that the *Hines* test was misinterpreted by the lower court in this case.[9] Unlike *Jones,* there is in this case no "clearly stated . . . major purpose", 430 U.S. at 541, of federal law that can be said to have been frustrated. To the contrary, there was nothing more than consideration of hypothetical conflict with some inferred objective or purpose of Congress. "[I]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists'." *Exxon Corp. v. Governor of Maryland,* — U.S. —, 57 L.Ed. 2d 91, 103 (1978); *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446 (1966).

[9] The lower court's reliance on *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977) was misplaced. In that case, California law regulating the average weight of packaged commodities was preempted by federal law. The preemption analysis, as applied to respondent Rath Packing Co. and its packaged bacon, was based upon an explicit preemption provision in the federal Weights and Measures Act, 21 U.S.C. §678 (1972). "This explicit preemption provision dictates the result in the controversy between Jones and Rath." 430 U.S. at 530-531. Neither the Williams Act nor the remainder of the Securities Exchange Act explicitly preempts state corporate takeover laws. The other respondents in *Jones* presented a question of conflict between the same state law and federal law governing net weight labeling of miller's flour. In finding preemption of the state law by the federal Fair Packaging and Labeling Act (FPLA), 15 U.S.C. §1461 (1974) this Court relied upon a specific purpose stated in the federal law. "As Congress *clearly stated,* a major purpose of the FPLA is to facilitate value comparisons among similar products." 430 U.S. at 541 (emphasis added). The application in Jones of the preemption test articulated in *Hines v. Davidowitz,* 312 U.S. 52 (1941), depended upon a finding of a specific objective or purpose of Congress in the FPLA that was frustrated by state law. There is no specific purpose set forth in the Williams Act, nor the remainder of the Securities Exchange Act of 1934, nor the underlying legislative history, that provides a basis for overriding the Idaho Corporate Takeover Law. At best finding such a purpose must be the result of supposition and inference.

Recent decisions of this court unmistakably underscore the requirement of a clear showing of congressional purpose or intent to establish preemption. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973). *Merrill Lynch* presented a preemption claim based upon a stock exchange employment termination rule, a self-regulatory rule issued pursuant to the Securities Exchange Act, that was in conflict with state labor law. In reviewing and constraining the purpose of the federal law, the Court noted that its "analysis is to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " 414 U.S. at 127.

Moreover, the Court in *Goldstein v. California,* 412 U.S. 546, 554-555 (1973), emphatically cautioned against needless findings of conflict:

> We must be careful to distinguish those situations in which concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of [state] sovereignty." The Federalist No. 32, p. 243 (emphasis in original).

Also standing in stark contrast to the decision of the lower court in the instant case is this Court's decision in *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470 (1974). In *Kewanee,* the Court considered whether a conflict existed between a patent clause of the U.S. Constitution and a state trade secret law applicable to patentable inven-

tions. The state law allowed a monopoly to continue in perpetuity rather than for seventeen years as provided by federal patent law. The Court again applied the *Hines* test, but reconciled the operation of the two laws: "Each has its particular role to play, and the operation of one does not take away from the need for the other." 416 U.S. at 493. By enacting state corporate takeover laws, states are similarly responding to considerations that are traditionally within the sphere of state corporation law.

Whether or not the *Hines* test is correct in determining preemption of state corporate takeover laws by the Williams Act, that test cannot be applied in a fashion requiring merely some conflict between the state law and *any possible* objective or purpose of Congress. Rather, if preemption exists at all, it must exist because of inevitable conflict between some readily discernible purpose of Congress and the operation of the state law. To hold otherwise would effectively destroy the ability of the states to regulate in any field also occupied by federal law. This proposition is, of course, incompatible with federalism, the Tenth Amendment of the United States Constitution and the previous decisions of this Court.

2. No Clearly Expressed Purpose That May Displace State Law is Evident on the Face of the Williams Act

a. Section 28 of the 1934 Securities Exchange Act Sets a Clear Test of Irreconcilable Conflict

A great deal has been said in this case by Great Western United Corporation and the lower courts about the objectives and purposes of Congress in enacting the Williams Act amendments to the Securities Exchange Act of 1934. Their emphasis has focused on the legislative history. Concern with the legislative history, however, has

tended to obscure the clear expression of congressional intent in Section 28 of the 1934 act, 15 U.S.C. §78bb(a) (1976). The language employed in the statute — whether or not conclusive — is the foremost guide to congressional intent. *U.S. v. American Trucking Association,* 310 U.S. 534, 543, n. 18 (1940). Section 28 provides in pertinent part that:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. 15 U.S.C. §78bb(a) (1976).

This provision, enacted in the original 1934 version of the Securities Exchange Act, articulates in clear terms that the standard to be applied in this case is a test of direct conflict.

If anything, this explicit statutory savings clause should operate to narrow the test of conflict applied by the courts rather than to sweep in any objective or purpose of Congress that may be inferred from the legislative history. Section 28 does not say that state law is preempted when some purpose or objective not clearly articulated in the federal law is frustrated, but only when it "conflict[s] with the provisions of this title or the rules and regulations thereunder." 15 U.S.C. §78bb(a) (1976). Notwithstanding Section 28, the lower court conveniently dismissed the relevance of the explicit language of Section 28 in the resolution of this case. As the Fifth Circuit Court put it: "Nor does any reason appear to give the term 'conflict' a special limited meaning in §28 of the 1934 Act. The language of the section does not compel such unusual interpretation." 577 F.2d at 1276. What seems unusual is that

a clear articulation of congressional intent can be so easily avoided.

Since the Williams Act amendments of the 1934 Act are silent on their relation with state law, and since the Williams Act contains no clear expression of congressional purpose aside from providing full disclosure to stockholders, Section 28 seems at the very least to sanction concurrent state law that does not *necessarily* result in conflict with the express terms or objectives of the federal law.[10]

b. There is No Inevitable Conflict Between the Williams Act and the Idaho State Corporate Takeover Law

The lower court acknowledged that the conflict identified in this case was not developed through comparative analysis of the details of the state and federal laws: "[W]e shall not focus on those inconsistencies nor decide whether they would be sufficient to preempt Idaho's law...." 577 F.2d at 1275. Rather, the court focused upon the legislative history and inferred the congressional purpose to avoid delay in tender offers and thereby maintain "deliberate neutrality among the contestants in a tender offer." 577 F.2d at 1277.

Had the Fifth Circuit Court instead decided to focus on the inconsistencies between the federal and state laws, it would necessarily have concluded that no inevitable conflict existed. For example, a major pretext for any alleged conflict lies in those provisions of the Williams Act which relate to the shortest possible time within which a tender offer must remain open. Without focusing on possible inconsistencies, the lower court nevertheless

[10] "Of course, under the securities laws state regulation may coexist with that offered under the federal securities law." *SEC v. National Securities, Inc.*, 393 U.S. 453, 461 (1969).

suggested in a footnote that conflict with the state law could be said to exist with Williams Act provisions used to infer minimum or prescribed time periods. 577 F.2d at 1275 n. 40. In particular, Section 14(d)(5) and (6) prescribe, in effect, minimum periods of time for the accomplishment of a tender offer. In pertinent part they provide:

> (5) Securities deposited pursuant to a tender offer . . . may be withdrawn by . . . the depositor at any time until the expiration of *seven days after* the time definitive copies of the offer . . . are first published or sent . . . to securityholders . . . (emphasis added).
>
> (6) Where any person makes a tender offer . . . for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within *ten days* after copies of the offer . . . are first published or sent . . . to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. . . . (emphasis added). 15 U.S.C. §78 n. (d)(5) and (6).

The Williams Act permits a tender offer to be accomplished within a short period of time, limited only in terms of minimum duration by the seven day withdrawal and ten day pro rata provisions.[11] Consequently, provisions of state law which operate to lengthen the minimum

[11] The Securities and Exchange Commission in its February 5, 1979 comprehensive rulemaking proposal on tender offers, Securities and Exchange Commission Release No. 34-15548 (February 5, 1979), clearly states the commission's understanding that Section 14(d)(6) of the 1934 Act sets "minimum" pro rata acceptance limits. *See* SEC Release No. 34-15548 at 95. The Commission has also proposed that the minimum seven day withdrawal period be extended to fifteen business days, proposed Rule 14d-7(a)(1), SEC Release No. 34-15548.

period might be said to "delay" a tender offer. The Idaho Law in §30-1503 does in fact provide for mandatory advance notice of a tender offer to the target and provide the ability to delay commencement of an offer by means of a hearing. Furthermore, the Idaho law at §30-1503(4) requires prior approval of the offer by the state director of finance where a hearing is called.[12]

However, while the state law may cause delay, nothing prevents the offeror from complying with both the applicable state and federal law. The offeror, after compliance with the state law, must merely comply with the federal pro rata and withdrawal provisions by allowing withdrawal and accepting pro rata deposits within the *minimum* federally prescribed periods *after* the tender offer is declared effective by the state. Preventing delay occasioned by state law in the accomplishment of tender offers is nowhere evident on the face of the Williams Act nor, for that matter, in its legislative history in terms of legislative purposes or objectives. Rather, the Williams Act merely sets minium standards for disclosure and timing of tender offers. The standards of the Williams Act are complemented by rather than in conflict with the additional requirements of state law.

B. The Purpose Congress Sought to Achieve Through the Williams Act Was Investor Protection Rather Than a Neutral Balance of Interests

Even if the test of direct conflict suggested by the terms of Section 28 is inapplicable to the resolution of this case, the lower court erred in identifying the congressional

[12] According to the Idaho law, a hearing may be called where "necessary or appropriate for the protection of offerees. . . ." IDAHO CODE §30-1503(4).

purpose upon which the Williams Act is based. The entire preemption theory of Great Western United Corporation's case and the basis for the lower court's decision is that the Idaho statute provides the target company with the opportunity to delay the takeover bid. Such delay is said to tip the scale of neutrality between the target and the tender offeror, sought in the enactment of the Williams Act, in favor of the target company.

In order to sustain this argument, it is necessary to identify a clearly expressed purpose or objective to avoid delay in tender offer bids and assure the offeror equal footing in presenting its case to stockholders. Beyond that, it is necessary that the state law said to be in conflict must inevitably frustrate the identified purpose. *Goldstein v. California,* 412 U.S. 546, 554 (1973). Since the Williams Act itself provides no support for this argument, the legislative history has been relied upon almost exclusively in developing the novel preemption theory of this case. A fair reading of the legislative history, however, lends no support to Great Western's argument.

This Court has recently had occasion to construe the purposes of the Williams Act in *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977). *Piper* presented the narrow issue of whether a defeated tender offeror has standing to sue for monetary damages caused by violation of the Williams Act. In holding that the offeror did not have standing to sue, the majority opinion of the Court responded emphatically to arguments made by the offeror that Congress established a policy of even-handedness in tender-offer regulation:

> In support of their reading of the legislative history, they [offeror, Chris-Craft and the SEC] emphasize, first, that in enacting the legislation Congress was

intent upon establishing a policy of evenhandedness in takeover regulation. Congress was particularly anxious, Chris-Craft argues, "to avoid tipping the balance of regulation. . . ."

Congress was indeed committed to a policy of neutrality in contests for control, but its policy of even-handedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. *Neutrality is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors.* 430 U.S. at 29. (Emphasis added).

In light of *Piper,* Great Western United Corporation in this case cannot establish a clear and manifest congressional purpose to maintain equal footing between the tender offeror and the target by minimizing delay in commencement of an offer. But rather, the basic purpose of the Williams Act is the "protection of investors."

The legislative history clearly discloses that the purpose of the Williams Act is to require "the disclosure of pertinent information and . . . afford other protection to stockholders. . . ." H.R. REP. NO. 90-1711, 90th Cong., 2d Sess., —, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811. In construing congressional intent, it is relevant to note that the supposed carefully constructed balance of tender offeror and target interests has been revised in the Williams Act since its original enactment. In 1970, Congress amended the law to reduce the reporting threshold from ten percent ownership to any class of equity securities to five percent. 15 U.S.C. §§78 m(d)(1), 78 n(d)(1). By lowering the level of beneficial ownership needed to trigger the Williams Act, management of a corporation being acquired is afforded an earlier opportunity to develop whatever action it wishes to take in response to the possibility of an acquisition resulting in

a hostile controlling interest. The legislative history of the 1970 amendments discloses nothing about an intentional shift in the supposed balance of offeror-target interests. The legislative history does, however, explicitly disclose the intent to "provide public disclosure of impending corporate takeovers at a more meaningful level." H.R. REP. NO. 91-1655, 91st Cong., 2d Sess., —, *reprinted* in [1970] U.S. CODE CONG. & AD. NEWS 5025, 5027 (1970). Investor protection, rather than the lower court's inferred purpose of "deliberate neutrality among the contestants in a tender offer," 577 F.2d at 1277, was the objective sought by Congress through the Williams Act.

The Williams Act is essentially a minimum standards disclosure law. Nothing in the law precludes delivery of additional information or use of tender offer periods in excess of the minimums prescribed. *See Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963). The fact that state law may compel additional disclosure, that it provides for administrative review of the reasonableness of the transaction, or that it may afford the investor additional time to reflect on the merits of a tender offer can hardly be said to be necessarily at odds with the Williams Act's basic investor protection objective. Consequently even if the state law causes some delay in the commencement of a tender offer, such cannot be said to inevitably frustrate a clear purpose of Congress.

II. RELATED CONGRESSIONAL AND ADMINISTRATIVE ACTIVITY DENYNG PREEMPTIVE CONGRESSIONAL INTENT

Subsequent to the original 1968 enactment of the Williams Act provisions, related congressional action as well

as action taken by the Securities and Exchange Commission in implementing the Williams Act substantially diminishes the possibility that Congress entertained any preemptive intent in establishing federal tender offer regulation.

A. Application of the Williams Act to Equity Securities of Insurance Companies Supports Congressional Acceptance of Concurrent State Tender Offer Regulation

Investor protection cannot be said to be inconsistent with state regulation of acquisitions and mergers where the state differs from the system established in the Williams Act. In at least one comprehensively state-regulated industry, Congress has implicitly accepted concurrent state regulation of mergers and acquisitions. Pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1970), Congress in 1945 made state law supreme as it relates to the "business of insurance." *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 430 (1945). The McCarran Act in pertinent part provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . ." 15 U.S.C. §1012(b).

This Court has clearly stated that state regulation of acquisitions and mergers, in the context of providing protection of policyholders (as distinguished from securityholders) constitutes regulation of the "business of insurance."[13]

[13] The fact that states may regulate insurance acquisitions and mergers was conclusively established by this Court in 1969. At that time, the Court considered the relevance of the 1934 Securities Exchange Act rules applicable to fraud and misrepresentation made in connection with proxy solicitations to the merger of two stock insurance companies, *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969). In *National Securities,* the argument was made by the author of the merger that the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, precluded application of the 1934 Securities Exchange Act. The merger in *National Securities* was dependent upon prior approval by the state Director of Insurance, and such approval was secured. *National Securities,* in point of relevance, presented nearly an opposite question from that considered in the instant case — namely whether state insurance regulation, by virtue of the McCarran-Ferguson Act, ousts federal securities regulation. The Court concluded that state law regulating securities, rather than the business of insurance, was not entitled to the special treatment accorded state insurance law by the McCarran Act. But at the same time, application of state insurance law to acquisitions and mergers of insurance companies, as that law relates to the interests of policyholders, was clearly reinforced in *National Securities.*

> The applicable [state] statute requires the State . . . to find that the proposed merger would not "substantially reduce the security of and service to be rendered to policyholders" . . . This section of the statute clearly relates to the "business of insurance." *SEC v. National Securities, Inc.,* 393 U.S. 453, 462 (1969).

Any shift in control of an insurer, whether made by tender offer, merger, proxy contest or private offer, is of similar interest to policyholders and the states. In short, state insurance regulation is unquestionably applicable to insurance company acquisitions and mergers as it relates to the "business of insurance."

Against this backdrop, Congress in 1970 amended the Williams Act to specifically apply to equity securities of insurance companies.[14] The 1970 amendments consequently extended the tender offer rules prescribed by

[14] Insurance companies prior to 1970 did not fall within the purview of the Williams Act because of the exemption contained in Section 12(g)(2)(G) of the 1934 Securities Exchange Act, 15 U.S.C. §78 1(g)(2)(G).

the Williams Act to an industry already comprehensively regulated by the states.[15] If Congress had intended that the Williams Act establish a system of tender offer regulation of insurance companies that precluded the application of any state standards, by virtue of the McCarran Act it would have been necessary to relate the Williams Act to the "business of insurance." This Congress did not do.

The fact that there exists a substantial state interest in comprehensively regulating certain industries, such as insurance, suggests that the Court must be circumspect in determining any preemptive intent to oust state regulation. As illustrated by the application of state insurance holding company laws to tender offer acquisitions of insurance companies, states may have legitimate purposes for regulating such transactions that were never even considered by Congress in enacting the Williams Act. For example, the NAIC in 1969 adopted its Model Insurance Holding Company Act[16] requiring prior approval of the insurance commissioner for any proposed acquisition of control, through tender offer or otherwise, of a domestic insurance company. This model has served as the basis for similar state enactments in most states. The commissioner is to withhold approval under this model if he finds that, *inter alia:* (1) the target insurer

[15] At least the following states enacted insurance holding company laws having effective dates in 1970 or before: Connecticut, effective June 11, 1969; Georgia, effective July 1, 1970; Iowa, effective 1970; Maryland, effective July 1, 1969; Massachusetts, effective June 30, 1970; Michigan, effective July 29, 1970; New Jersey, effective April 3, 1970; New York, effective 1969; Oklahoma, effective April 9, 1970; Oregon, effective January 1, 1968; South Carolina, effective 1962; and Tennessee, effective 1970.

[16] NAIC Insurance Holding Company System Regulatory Act, II PROCEEDINGS OF NAIC, 738-751 (1969).

after the change of control could not meet the insurance licensing requirements of the state; (2) the effect of the acquisition would be to lessen competition; or (3) the financial condition of the acquiring party might jeopardize the financial stability of the acquired insurer.[17] Considerations of this sort clearly relate to the "business of insurance" and are therefore clearly sustainable under the McCarran Act and the *National Securities* case.

Nevertheless, like the Idaho Corporate Takeover Law, tender offers for insurance companies are subject to hearing requirements, state approval, notice and other requirements giving the target insurer an opportunity to "delay" a proposed takeover bid. Similarly, states may engage in other tender offer regulation serving purposes analogous to those here described in other industries affected with a special public interest such as utilities or financial institutions. In enacting the Williams Act, Congress cannot be said to have been unmindful of such state interests, especially in the context of insurance since the 1970 amendments to the Williams Act, pertaining to insurance securities, followed so closely this court's 1969 landmark decision in *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969).

Given the relevance of state insurance law to acquisitions and mergers of insurance companies, as supported by *National Securities,* Congress might have provided some specific savings clause for state insurance regulation if such regulation was in fact appropriate, but yet anomalous to the general Williams Act relationship with state laws. There is, significantly, no difference apparent in the Williams Act treatment of insurance company securities from those of any other line of business. Con-

[17] The insurance laws of most states include provisions substantially similar to those of the NAIC model concerning approval of tender offer (or other) acquisitions. *See* citations listed at note 3 *supra.*

gress in 1970 did not seek to apply exclusive takeover regulation to insurance companies just as it sought no exclusivity in any other line of business with the original enactment of the Williams Act. If Congress had desired to apply takeover rules to insurance companies unfettered by state insurance regulation, it would, in light of *National Securities,* have been necessary to specifically oust such state regulation by referring to the "business of insurance." The fact that the 1970 amendments of the Act are entirely silent on this point reinforces the argument that Congress did not entertain any compelling purpose to establish a careful balance of target tender-offeror interests that must not be upset in any way by the states. More significantly, application of the Williams Act to insurance securities evidences congressional acceptance of state acquisition and merger regulation.

B. The 1976 Antitrust Improvements Act Denies Preemptive Intent

The basis for the Fifth Circuit's preemption holding turns on the Williams Act's promotion of evenhanded regulation of contestants in a tender offer bid. Essential to this argument is acceptance of the proposition that Congress in 1968 constructed a careful and deliberate balance between incumbent management and the tender offeror. Supposedly assuring this balance are Williams Act provisions such as the pro rata acceptance requirement, 15 U.S.C. §78 n(d)(6), and the withdrawal period, 15 U.S.C. §78 n(d)(5), for tendered shares. These are said to assure both existing management and offeror a fair opportunity to consider the merits of each position in a contested tender offer.

But Congress in 1976 enacted the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a (1976).

This new premerger notification law established premerger notice and waiting requirements which effectively preclude consummation of a tender offer for large corporations within the scope of the laws for at least fifteen days after the time of notification to the federal government, 15 U.S.C. §18a(b)(1)(B). Not only does this new premerger notification law establish a waiting period of at least 15 days, but notice of a proposed tender offer acquisition must be given to the person being acquired in order for that person to make a filing also required by the law concerning the acquisition's antitrust implications. 15 U.S.C. §§18a(a), (d).[18] Although the rules applicable to cash tender offers are different than those generally established for amicably negotiated mergers, the Hart-Scott-Rodino Act commits Congress to a significantly different tender offer schedule than that alleged to have been purposefully established in the Williams Act.

C. Securities and Exchange Commission Rulemaking Proposals Deny Any Commission Understanding of Preemptive Intent

Although the Securities and Exchange Commission intends to promulgate a comprehensive scheme for regulating tender offers, the commission has yet to adopt final rules respecting most tender offer activity. However, rules proposed by the commission over the last few years

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[18] The Federal Trade Commission rules implementing the Antitrust Improvements Act of 1976 provide for the filing by the person acquiring securities of another of a notification and report form, 43 Fed. Reg. 33,548 (1978) (to be codified in 16 C.F.R. §803.1). Among other things, the filing is to contain an affidavit attesting that the acquiring person has given notice in writing to the person being acquired. 43 Fed. Reg. 33,549 (1978) (to be codified in 16 C.F.R. §803.5). The waiting period prescribed by the Act does not begin to run until the date of receipt by the federal government of the notification report form. 43 Fed. Reg. 33,549 (1978) (to be codified in 16 C.F.R. §803.10).

have expanded required disclosures and lengthened the minimum periods of time applicable to tender offers. The commission in 1976 proposed Rule 14e-2, Exchange Act Rel. No. 12676, 17 C.F.R. §240-14e-2 (1976), which would have required that any tender offer must remain open for at least fifteen business days from the date of first publication. According to the 1976 release on the rule, such a minimum period "would provide a more realistic time frame for security holders to evaluate a tender offer. . . ." [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶30,659, p. 86,695 (August 2, 1976). This proposed rule was published for comment pursuant to the commission's rulemaking authority under section 14(e) of the 1934 Act, 15 U.S.C. §78 n(e). This section of the Act prohibits fraud and manipulation in connection with tender offers. The Commission evidently now has even greater concern for the minimum periods of time within which tender offers may be completed. On February 5, 1978 the commission withdrew the 1976 proposed Rule 14e-2 and substituted a new proposed Rule 14e-1 establishing a minimum thirty business day rule during which tender offers must remain open. SEC Release No. 34-15548 (February 5, 1979). In explaining the need for proposed Rule 14e-1, the Commission states that "[t]ender offers of an excessively short duration increase the likelihood for hasty, ill-considered decision making and the possibility for fraudulent, deceptive, or manipulative acts or practices. . . ." SEC Release No. 34-15548 at 111-112.[19]

[19] The commission goes on in providing background to proposed Rule 6e-1 to evidence substantial agreement with state concerns for tender offers that are conducted without a fair opportunity for shareholder consideration. The commission also evidences its concern with the emerging pattern of state laws:

> The problems engendered by these tender offers of excessively short duration also may have provided part of the stimulus for some of the 36 states which have enacted anti-takeover statutes since 1968. To the extent this was a purpose of such legislation, the attempt to alleviate the problem was laudable, but has resulted in an inconsistent, overlapping and often counter productive pattern of regulation and in many instances may have tipped the carefully construed balance between bidder and subject company envisioned by the Williams Act in favor of [the] subject company. Accordingly, the commission believes that a uniformly applied federal regulation would better serve the purposes and policies of the Williams Act . . . . SEC Release No. 34-15548 at 112.

Whatever the commission's opinions as to the need for singular or uniform federal regulation, the preemption question facing this Court is whether Congress intended to preclude state regulation of tender offers. The action proposed by the SEC, to broaden disclosure and lengthen the time periods within which tender offerors must operate, on its face denies any commission understanding of a careful and deliberate balance drawn by Congress. The commission in fact admits the need for regulation of the sort provided by the states. If state regulation is to be ousted, there must be a clear expression of congressional intent to that effect. The action taken by the commission, notwithstanding what it says about uniformity, suggests that the commission does not agree with the preemptive purpose identified by the lower court.

In addition to its general rulemaking authority, the Williams Act specifically provides that the Securities and Exchange Commission may by rule prescribe time periods different than those included in the Act for shareholder withdrawal and pro rata acceptance of tendered shares. 15 U.S.C. §78 n(d)(5) and (6). To date the Commission has yet to adopt final rules to implement these statutory tender offer requirements including those relevant to the establishment of a minimum withdrawal and pro rata acceptance periods for tender offers. However, the commission has proposed Rule 14d-7(a)(1) which would extend the statutory seven day withdrawal right, 15 U.S.C. §78 n(d)(5), to fifteen business days from the commencement date of the tender offer. In addition, proposed Rule 14d-7(a)(2) operates to further extend withdrawal rights for ten business days following a competing tender offer made by the target company

or another bidder. SEC Release No. 34-15548. These and other similar proposals by the commission strike at the heart of arguments made concerning preemptive congressional intent to avoid delay and thereby strike a neutral balance between tender offerors and target company management.

Contrary to the lower court's analysis, as borne out by subsequent congressional and administrative action, Congress was not intent in the Williams Act on establishing a carefully-drawn neutral balance between tender offer contestants, but rather sought to protect investors. This latter objective has not been shown in this case to be at odds with the challenged state law.

CONCLUSION

The NAIC urges this Court to reverse the decision of the Fifth Circuit. In enacting the Williams Act, Congress entertained no intent to preclude parallel state regulation of tender offers that serves to promote investor protection or other legitimate state interests. The preemption analysis of the lower court erroneously focused upon characteristics of federal legislation that serve to promote, but do not establish, the purpose of investor protection. The state law challenged in this case shares this congressional purpose and complements federal law.

Respectfully submitted,

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